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No. 02-361

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF THE GREENVILLE, SC, KAYSVILLE, UT, AND KENTON COUNTY, KY PUBLIC LIBRARIES AS *AMICI CURIAE* IN SUPPORT OF THE APPELLANTS

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QUESTION PRESENTED

Whether a public library's use of filtering software in an effort to reduce the ability of library patrons to access and display illegal obscenity and child pornography violates the First Amendment.

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BRIEF OF THE GREENVILLE, SC, KAYSVILLE, UT, AND KENTON COUNTY, KY PUBLIC LIBRARIES AS *AMICI CURIAE* IN SUPPORT OF THE APPELLANTS

Interests of the *Amici*

This brief is filed with the consent of the parties[1] on behalf of the Greenville, SC, County Library, the Kaysville, UT, City Library and the Kenton County, KY, Public Library. Each of the *amici* is a public library that wants to be able to use filtering software on its Internet browsers without

[1] The parties' letters of consent have been filed with the Clerk in compliance with Rule 37.3. This brief was not authored in whole or in part by counsel for any party. The Center for the Community Interest provided funding for printing the brief.

becoming subject to judicial regulation under the First Amendment. The decision of the three-judge district court in this case rests on a conclusion that such filtering violates the First Amendment rights of library patrons. Regardless of the validity of the federal funding statutes directly at issue, any decision of this Court that reached the same conclusion would prevent public libraries from voluntarily using software filters to reduce the possibility that patrons would access illegal obscenity and child pornography. *Amici* therefore have an interest in having this Court reject the First Amendment analysis employed by the district court.

Amici also wish to advise the Court that the position taken by the American Library Association in this case is not shared by all libraries. There are many public libraries that believe the essence of a library's selection process involves precisely the form of content-based discrimination that the First Amendment normally prohibits. *Amici* believe that many public libraries think they should be free to select books without being subject to judicial review under the First Amendment. We believe that this "freedom to choose" also applies to the Internet and a decision to install filtering software. There are other public libraries, in addition to these *amici*, that share our views, but are inhibited from taking a public position contrary to the shortsighted request for judicial intervention that has been adopted by the ALA.

We believe the Court should consider the views of the many libraries that do not support the ALA position, especially with regard to the impact that prohibition of filtering will have on the library environment and the adverse precedential effect that applying traditional First Amendment principles will have on the basic process of selecting materials for inclusion in libraries.

Summary of Argument

The district court's application of the First Amendment is fundamentally inconsistent with the mission and purpose of libraries. The task of every library is to select material, based on its content, which will be made available to the library patrons. Judicial regulation of those decisions under the First Amendment would eliminate the traditional freedom of libraries to make accession decisions without external governmental control.

As the district court found, the Internet contains an extensive amount of illegal obscenity and child pornography. Unfiltered access to the Internet will inevitably allow library patrons to display unprotected and illegal materials in a public place. Libraries that have allowed unfiltered Internet access have experienced significant problems with regard to such illegal conduct. The district court's decision in effect requires public libraries to facilitate public display of illegal obscenity and child pornography.

The Court should vacate the decision below and hold that the First Amendment does not apply to accession decisions of public libraries.

Argument

I. The First Amendment Does Not Preclude Use of Internet Filtering Systems in Public Libraries

The district court concluded that the First Amendment applies to public library acquisition decisions and that the standard is "strict scrutiny." The Solicitor

General argues that if the First Amendment applies, the proper standard is "rational basis review." We submit that the Court has not yet decided whether the First Amendment has any application to a public library's choice of materials to be made available to its patrons. We further submit that the Court should conclude that the First Amendment does not govern a public library's decision to acquire materials or to make materials on the Internet available to patrons. To the extent there is a constitutional constraint on those decisions, it would be found in the Equal Protection Clause protection against invidious discrimination, not in the First Amendment protection of free speech.[2]

A. This Court Has Never Held That The First Amendment Applies to A Public Library's Acquisition Decisions – Amici Submit It Does Not

The district court decision rests on an assumption that the First Amendment applies to public libraries when they decide what information to make available to patrons. The assumption is not founded on any controlling precedent[3]. No prior opinion of this Court has decided whether the First Amendment applies to a library acquisition decision. The Court has considered the issue only once. In *Board of Education v. Pico*, 457 U.S. 853 (1982), the Court considered whether the First Amendment applied to a public

[2] If a library were to limit its acquisitions in a manner that amounted to discrimination against a race, gender, religion or political party, a court might properly conclude that the policy was unconstitutional under the Equal Protection Clause.

[3] The district court passed on the issue in a footnote: "Because we find that the plaintiff public libraries are funded and controlled by state and local governments, they are state actors, subject to the constraints of the First Amendment, as incorporated by the Due Process Clause of the Fourteenth Amendment." (J.S. App. 96a; 201 F.Supp.2d at 451, n 20)

school library's decision to remove certain books from its shelves. There was no opinion for the Court. Four Justices concluded that the removal violated the First Amendment, while four concluded that it did not. The deciding vote to remand for trial was cast by Justice White who believed the issue was not ripe for summary judgment and hence did not address the First Amendment issue. Justice Brennan's opinion concluding that the **removal** was unconstitutional pointedly distinguished a decision to **acquire** a book. *Id.* at 872-73. Internet filtering involves the acquisition process, not the removal of information that has already been acquired. There are no subsequent reported decisions and the *Pico* issue has not been considered here in the past 20 years.

We suggest that a principal reason behind the deeply divided decision of the Court in *Pico* was an awareness by several of the Justices of the consequences of holding that the First Amendment applied to decisions by a library concerning its holdings. The essence of sound librarianship with respect to acquisition and de-selection decisions is **content-based discrimination**. Librarians necessarily choose to allocate their limited resources[4] to materials they deem most appropriate for the patrons they serve. The process inherently requires library officials to make choices of what to offer based on the content of those materials.

[4] The district court correctly rejected the argument that unfiltered Internet access did not affect allocation of scarce resources. (J.S. App. 126a; 201 F.Supp.2d at 465, n 25) "The same budget concerns constraining the number of books that libraries can offer also limits the number of terminals, Internet accounts, and speed of access links that can be purchased, and thus the number of Web pages that patrons can view. This is clear to anyone who has been denied access to a Website because no terminal was unoccupied." Mark S. Nadel, *The First Amendment's Limitations on the Use of Internet Filtering in Public and School Libraries: What Content Can Libraries Exclude?*, 78 Tex. L. Rev. 1117, 1128 (2000).

The essence of librarianship is, in short, inconsistent with one of the basic tenets of traditional First Amendment jurisprudence that content-based decisions regarding speech are suspect.[5] If the Court adopts the district court's conclusion, Chief Justice Berger's concern that "this Court would come perilously close to becoming a 'super censor' of . . . library decisions" would become a reality. *Pico, supra,* at 885. Given the heightened awareness of library acquisitions that this case has spawned, it would not be possible to limit any decision applying the First Amendment in this case to the narrow issue of Internet filtering. Application of the First Amendment here will be an open invitation to further federal litigation on any public library acquisition or de-selection decision that any patron, author or publisher disagrees with. The Court should not expand the judiciary's role by rendering a decision that the First Amendment applies. Such a decision would fundamentally alter the allocation of responsibility for control of library accession decisions. Affirmance of the district court's

[5] This traditional principle does not apply if the government entity is not a traditional public forum. In such cases, content-based decisions are permissible. In addition, the Supreme Court has in recent years clarified that the essence of the traditional judicial antipathy to content-based decisions needs to be re-formulated to clarify that the area of judicial concern is really with "viewpoint" discrimination as distinguished from "content" discrimination. The Solicitor General correctly explains why this case does not involve any "viewpoint discrimination" (Juris. Statement at 22).

decision would, in effect, make the federal judiciary the national Supreme Librarian.[6]

There is no textual or historical basis for applying First Amendment limitations to public library acquisition decisions. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." This case – like the government grants considered in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) – does not involve any governmental action to suppress or prevent anyone from speaking or receiving any speech. All that Internet filtering does is to restrict use of government resources for transmission of certain speech through a specific channel. No speaker whose website is blocked by an Internet filter is precluded from publishing that same speech in any form, using any medium. No patron of any library that uses filtering is precluded from having access to that speech through other Internet facilities. As such, this case fits Justice Scalia's observation in *NEA v. Finley* that denial of public resources to support or provide an outlet for speech is not by any means an *abridgment* of that speech. *Id.* at 2182-85 (concurring opinion).

Because a library's Internet filtering system does not suppress any communication, but merely closes one discrete

[6] This characterization is not rhetorical exaggeration. Last October the ACLU filed a complaint in the Southern District of Georgia to compel a public library to provide space for distribution of free publications. *See The Gay Guardian Newspaper v. Ohoopee Regional Library System,* 02-CV-104 (S.D. Ga). The Complaint is available online at http://www.aclu.org/Files/OpenFile.cfm?id=10850. The district court in this case attempted to distinguish its decision on Internet filtering from a library decision to include or exclude a particular book. The Solicitor General argues persuasively that this distinction is untenable. But the existence of that extended discussion in the district court's opinion illustrates the fundamental inconsistency between core First Amendment jurisprudence and the core mission of libraries.

pathway involving certain specific government-owned facilities, it is not a abridgment of speech within the protection of the First Amendment.[7]

B. If The First Amendment Applies, The "Reasonable Basis" Standard Applies, Not The "Strict Scrutiny" Standard

The district court concluded that the "strict scrutiny" standard applies to library filtering. We agree with the Solicitor General that if the First Amendment applies at all, the "rational basis" test is the appropriate standard.

For purposes of the First Amendment, this "Court [has] identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). "Traditional" public fora include those places which "by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). They include "streets and parks which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 45 (internal quotation marks and citations omitted). Computers are devices of very recent origin. They are manifestly not in the category of traditional public fora.[8]

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[7] There is no historical basis for extending First Amendment protections to public libraries. The first public library was established in Boston in 1854, more than 60 years after adoption of the First Amendment.

[8] *See International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 694 (1992) ("Airports are of course public spaces of recent vintage, and so there can be no time-honored tradition associated with airports of permitting free speech") (Kennedy, J. concurring).

A "designated" public forum "consists of public property which the State has opened for use *by the public* as a place for expressive activity." *Id.* at 45 (emphasis added). Moreover, in order to be a "designated" public forum, the property must be open to "*indiscriminate* use by the general public." *Id.* at 47 (emphasis added). Thus this Court has explained that "[t]he mere fact that an instrumentality is used for the communication of ideas does not make a public forum . . . . Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities, immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." *Perry*, 460 U.S. at 49, n.9 (internal quotation marks and citations omitted). No library has opened its doors for indiscriminate use by the public at large for all communication purposes. Libraries accordingly are not properly characterized as "designated" public fora. *But see Kreimer v. Bureau of Police*, 958 F.2d 1242, (3d Cir. 1992)(concluding that a library is a designated public forum and upholding library regulations on patron behavior).

A "non-public forum" (sometimes called a "non-forum") consists of "publicly-owned facilities that have been dedicated for either communicative or non-communicative purposes, but that have never been designated for indiscriminate expressive activity by the general public." SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 8:8. Libraries fall into this category and are subject to the broad authority that government may exercise over such property.

In the traditional forum content-based regulations of citizen speech are subject to strict scrutiny. Such regulations will survive challenge only if "narrowly drawn to achieve a compelling state interest." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). In a "designated" forum the government may dedicate it to

certain purposes and impose limitations that are "reasonable in light of the purpose served by the forum," as long as the regulation does not result in "viewpoint discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (quoting *Cornelius*, 473 U.S. at 406). By contrast, in a non-public forum "the state has maximum control over communicative behavior since its actions are most analogous to that of a private owner." *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2nd Cir. 1991). "[G]overnment imposed restrictions of speech in [non-public fora] will be upheld so long as reasonable and viewpoint neutral." *Lee Art Theater, Inc. v. Virginia*, 505 U.S. 636, 694. (Kennedy, J. concurring). As Smolla and Nimmer have pointed out:

> The government "may reserve the forum for its intended purposes *communicative or otherwise*, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials opposed the speaker's view. Entire classes of speech thus may be excluded from a non-forum. Those classes may be identified by content, as long as the exclusion is reasonable in light of the purpose of the forum and there is no discrimination upon viewpoints *within a* class.

SMOLLA AND NIMMER § 8:8 (quoting *Perry*, 460 U.S. at 47 with emphasis added by Smolla and Nimmer).

The communications that are the target of the filtering software mandated by the federal statute are websites containing obscenity, child pornography or material harmful to minors. This restriction is manifestly the sort of content-based regulation that is permissible under the First Amendment standard that governs "designated" fora or non-

public fora. This restriction has nothing to do with point of view.[9]

C. Internet Filtering Meets Both the "Reasonableness" and the "Least Restrictive Means" Tests

The Solicitor General and other *amici* have shown why filtering software is a reasonable restriction on Internet access in a public place. We submit that current obscenity filtering software is the least restrictive means of precluding access to illegal pornography, despite the acknowledged inherent inaccuracies in filtering technology.

The filtering software considered by the district court here is intended to reduce access to materials that are obscene, constitute child pornography or contain material harmful to minors. There is no doubt that the public interest in limiting that access is a compelling government interest. Six present members of this Court have agreed that the "interest of protecting children [from seeing patently offensive sex-related material on TV] is compelling." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 747 (1996) (opinion of Justice Breyer, joined by Justices Stevens, O'Connor and Souter, stating that the view is shared by Justices Kennedy and Thomas).

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[9] *See General Media Comm. v. Cohen*, 131 F.3d 273, 282 (2nd Cir. 1997), 1997 U.S. App. LEXIS 40571 *23 (corrected Mar. 25, 1998) (rejecting as "linguistic overreaching" claim that "lasciviousness" is a viewpoint); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (rejecting claim that "offensively lewd and indecent speech" was related to political viewpoint); *Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (plurality opinion) (an "unconstitutional motivation could not be demonstrated" if school board removed library books because they were "pervasively vulgar" rather than because of "disfavored ideas").

The district court held that filtering software was not the least restrictive means for protecting the government's interest. That holding is based on a misapplication of the least restrictive means doctrine. The doctrine requires an assessment of the specific legitimate government goal and the desired goal, a consideration of how well the challenged practice achieves that goal and a comparison of alternatives with regard to whether they achieve the **same** goal with less restriction of protected speech. "[T]here must be a congruence between the means used and the ends to be achieved." *City of Boerne v. Flores*, 521 U.S. 507, 530 (1977).

The district court concluded that filtering software blocked too much protected speech in comparison with other alternative procedures. The flaw in that comparison was that the district court failed to focus on the legitimate goal – *reducing patron's access to unprotected obscenity and child pornography*. None of the alternatives that the district court considered **reduced** access to illegal materials. All that most of the alternatives did was to reduce the risk that someone other than the patron who was using the Internet terminal would be exposed to the materials. The "tap on the shoulder" and "report it to the police" alternatives do not reduce the probability of access; they are "after-the-fact" sanctions. Similarly installation of privacy screens cannot reduce the probability of illegal access. Those less restrictive alternatives relied upon by the district court are simply not comparable to filtering software because they do not block access to the illegal material.

The only alternative considered by the district court that has any prophylactic potential is the "proper use policy" approach. But no one would contend that a paper policy is as effective as filtering software in actually preventing access to

illegal materials.[10] The First Amendment does not require a government entity to use a less effective restriction in order to achieve a legitimate end. Before a particular restriction can be held unconstitutional, the court must find that there is an alternative that is less restrictive with respect to protected speech, but equally effective at regulating the unprotected speech. The district court failed to apply this basic principle.

Filtering software is imperfect. All observers agree on that. But no one has yet suggested any equally effective – but less restrictive – means of reducing access to the vast sea of unprotected illegal materials that is on the Internet. The Internet filtering software available today is the least restrictive means available for achieving the legitimate goal of libraries that wish to limit access to such materials.[11]

D. Libraries, Like the Postal Service, Are Not Compelled to Transport Obscene Materials

The district court rested its decision, in part, on an analogy to the postal service. It cited *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) and *Blount v. Rizzi*, 400 U.S. 410 (1971), two decisions regarding restrictions on access to postal services. While analogies to the Postal Service are not perfect, there is some legitimacy in considering practices in that communications channel in this context. Both the Postal Service and public libraries act as conduits for information.

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[10] The actual experience of *amicus* Greenville County Library as described below shows how ineffective "tap on the shoulder" and proper use policies are in deterring access.

[11] We recognize that application of a "least restrictive means" analysis might preclude use of specific filtering software that failed to conform to "best practices" in the industry and blocked far more protected speech and far less unprotected speech than available alternative software. But that possibility does not justify the blanket conclusion of the district court that ***all*** filtering software is unconstitutional.

But it is well established that the Postal Service cannot be used to carry obscene materials. Section 1461 of Title 18 of the United States Code specifically provides that "[e]very obscene, lewd, lascivious, indecent or filthy article . . . is declared to be nonmailable matter and shall not be conveyed in the mails or delivered by any letter carrier." The Court has repeatedly held that the statute is constitutional. *Roth v. United States*, 354 U.S. 476 (1957); *United States v. Reidel*, 402 U.S. 351 (1971); *Smith v. United States*, 431 U.S. 291 (1977). Prosecutions under that statute are not uncommon.[12]

If the Postal Service – a nationwide government monopoly – cannot be used to carry obscene material, then certainly a local library can refuse to disseminate obscene material, whether in print or on the Internet.[13] This conclusion is particularly appropriate in light of the fact that closing the mails to obscene material represents a government refusal to allow a unique and irreplaceable government asset to be used by citizens to communicate materials that are not protected by the First Amendment. As

[12] *See, e.g., United States v. Schein*, 31 F.3d 135 (3rd Cir. 1994); *United States v. Carmack*, 910 F.2d 748 (11th Cir. 1990); *United States v. Kuennen*, 901 F.2d 103 (8th Cir. 1990), *certiorari denied*, 498 U.S. 958. Each case was a prosecution under 18 U.S.C. § 1461.

[13] Nothing in the Court's subsequent decision in *Manual Enterprises v. Day*, 370 U.S. 478 (1962) undercuts this argument. In that case a publisher of magazines sued to overturn an administrative refusal to accept certain magazines for mailing. A divided seven-Justice Court set the refusal aside. Justices Harlan and Stewart concluded that the magazines in question "cannot be deemed legally 'obscene.'" *Id.* at 482. Justices Brennan, Douglas and the Chief Justice concluded that the criminal statute did not authorize administrative action to refuse to accept matter for mailing. *Id.* at 495-519. Justice Clark dissented and would have upheld the administrative exclusion against the First Amendment challenges. Justice Black concurred in the judgment without joining or expressing any opinion. *Id.* at 495. Justices White and Frankfurter did not participate in the decision. *Id.*

noted above, closing a public library's Internet terminals to obscenity leaves library patrons free to access that material through other terminals.

The administrative scheme invalidated in *Blount v. Rizzi* as an unconstitutional limitation of First Amendment rights allowed the Postmaster General to detain all mail sent to individuals believed to be using the postal system for commerce in obscene materials. The regulatory scheme was comprehensive and affected all incoming mail, without regard to whether the specific item was obscene material. When a library uses filtering, it does not prevent any individual from accessing the Internet. The filters do not delay or deny access to the total Internet universe, but instead limit access by blocking a relatively miniscule segment of that vast sea of Internet information. An administrative detention of all incoming mail is markedly different from a selective denial of access to a limited amount of material.

Lamont v. Postmaster General involved an administrative interference with delivery of mail believed to be communist propaganda, material that was protected by the First Amendment. That administrative scheme was based on viewpoint discrimination. The Internet filtering at issue here shares neither of those characteristics. Obscenity and child pornography is not protected by the First Amendment and the filtering software used by libraries does not involve any discrimination against a particular viewpoint.

II. Public Libraries Have a Duty, Not Merely a Right, to Filter Internet Pornography to Avoid Facilitating The Felonies That Are Committed When Patrons Access Obscenity Or Child Pornography In A Public Place

It is indisputable that there is a vast amount of obscenity and child pornography on the Internet that is not protected by the First Amendment and is illegal under state and federal laws. The material of concern is not "soft core pornography" but plainly obscene material. The Government put examples of some of that material in the trial court record. *E.g.* Def. Ex. 185A. Other examples of material that is even more "hardcore" than the trial exhibits can be found with ease using a common Internet search engine.[14] It is also indisputable that when a library offers unfiltered access to the WorldWideWeb, library patrons can and will access and display illegal material.[15] *See, e.g., What Would Dewey Do? Libraries Grapple With Internet,* THE NEW YORK Times, Dec. 2, 2002. Well-publicized proceedings across the nation prove that access to illegal obscenity on the Web is not a theoretical problem, but a real

[14] A January 2003 search for Internet sites using the term "anal sex" and the www.google.com search engine produced more 2,000,000 "hits". While not all those sites contain illegal obscene material, many of them do. A few examples of the numerous sites that are plainly obscene are: http://www.absoluteanalporn.com/; http://www.abbeyxxx.com/top100/; http://www.bestiality.com/; http://ultrahardcore.com/; and http://www.xratedpics.com/.

[15] Congress was provided documentation of over 2,000 instances of patrons, many of them children, accessing pornography, obscenity, and child pornography in the nation's public libraries. Defts' Ex. 6 (H.R. Serial No. 106-115), at 30; *see also* Defts' Ex. 8 ("Dangerous Access" Report) (available at http://www.frc.org/get/bl063.cfm).

one that has caused a significant re-allocation of law enforcement resources. Indeed the Department of Justice has created a special component for investigating and prosecuting Internet child pornography.[16]

The experiences of each of the *amici* illustrate the extent of the problem. The Kenton County Library initially offered access to the Internet on an unfiltered basis. They found that patron demand for their terminals exceeded their expectations. The sole interest of a significant number of patrons appeared to be pornography. Parents complained that their children had seen pornography on terminal screens, including one instance where the default desktop image on a terminal had been changed to a pornographic picture. Pictures of sex acts were left in the output trays of library printers. Eventually the library installed filtering software to reduce the incidence of such problems. If the district court's decision were affirmed, Kenton County could no longer use its filtering software, regardless of any receipt of federal funds.

The Kaysville Utah Library has a "proper use" policy that advises patrons that the library terminals are for reference research and that pornography does not qualify as a reference tool. Patrons are advised that violation of the policy can lead to loss of library privileges. Reviews of the logs of Internet access have disclosed frequent violations of the stated policy. The library believes a possible pedophile has used the terminals for contacting potential victims. Some patrons have altered terminal settings to leave objectionable images on the screen. The problems have been so extensive that the library decided to re-locate all terminals

[16] Child Exploitation and Obscenity Section, DOJ Criminal Division. *See* http://www.usdoj.gov/criminal/ceos/inves_prosec.htm

into the main body of the library so the staff could see all the screens and monitor use better.

The Greenville County Library first offered unfiltered Internet access in the summer of 1998. While the written policy included a provision that users could not "display obscene materials, child pornography, and/or other materials prohibited under applicable local, state, and federal laws," the former Executive Director told the staff that they should never interfere with a patron's use of the terminals, regardless of what was displayed on the terminals.[17] In February 2000 the library instituted a "tap on the shoulder" policy and installed "privacy desks" around the majority of Internet terminals. Those changes did not, however, significantly reduce access to improper materials. A library staff member estimated that 20-25% of patrons used the Internet to access pornography and/or obscenity. A June 27, 2000 review of the log file from one terminal revealed that at least 20% of the sites visited were pornographic or obscene.

During one nine month period the Greenville Library documented more than 100 such incidents including:

- A live video of people engaging in heterosexual and homosexual sex.
- A live video of people engaging in sex with animals, including a girl with a strapped on plastic penis having sex with a dog and a man having sex with a chicken.
- A live video of men having oral sex with boys.
- A live video of a male ejaculating onto the face of a woman.
- Live videos of male and female masturbation.

[17] That individual is no longer with the library. His policy was consistent with – if not strongly influenced by -- the policy of the Appellee American Library Association.

Library staff also reported several instances of adults exposing children to pornography and/or obscenity using the Internet terminals. Many more examples, including access to child pornography and access by minors, are documented in the Report of the Greenville Operations Committee.[18] The reported incidents are believed to represent merely a fraction of the actual number incidents that have occurred.

The Greenville Library Committee concluded that the "proper use," "tap on the shoulder" and "privacy desk" policies were ineffective. The majority of the incidents reported had occurred after those measures had been implemented. The Library ultimately installed filtering software. (J.S. App. 40a; 201 F.Supp.2d at 424) In the year following "installation of the [filtering software] in July of 2000, there [had] been no Internet related incidents involving library security staff, no complaints by the public and only twelve (12) web sites have had to be blocked locally and twelve (12) sites have been unblocked locally." *Greenville County (SC) Library System Case Study for N2H2*, (June 2001) available through the Internet at http://www.n2h2.com/pdf/library_case_study.pdf.

Public libraries are government agencies. As such it is especially important that they not only act lawfully, but also avoid actions that will facilitate unlawful actions of their patrons. No reasonable person would suggest that a library has a responsibility to provide not only information on drugs, but also the means for patrons to make drugs in the library. Yet that is precisely what the proponents of "no filters" in essence urge. The position advanced here by the Appellees – and accepted by the district court – is that once a library

[18] The Greenville Report can be accessed on the Internet at http://www.copacommission.com/papers/greenvillereport.pdf. The Chairman of the Greenville Library Board testified at the trial below.

decides to allow any access to the Internet, it is compelled by the First Amendment to give its patrons all the tools they need in order that they might commit felonies in a public place using public facilities. That position, we submit, defies logic, common sense and any reasonable interpretation of the core concepts of the Constitution and the Rule of Law.

In most of the states public display or obscene material is illegal. In many it is a felony.[19] Interstate transmission of child pornography, including viewing files over the Internet, is a federal crime.[20] The Oklahoma and Tennessee Attorneys General have opined that if library personnel knowingly allowing a minor library patron to view material that is harmful to minors they could expose themselves to criminal liability.[21] The Tennessee Attorney General advised that implementation of filtering software would be a defense to any such charge, if filtering is constitutional. But regardless of any criminal liability for library employees, intentional access and display of obscene materials or child pornography by a library patron would be

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[19] A listing of all state obscenity laws is available at http://www.morality inmedia.org/nolc/index.htm?statutesIndex.htm

[20] 18 U.S.C. §§ 2252, 2252A; *see also* 18 U.S.C. § 1465 (interstate transportation of obscenity); *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996) (conviction for transmitting obscenity using personal computers and telephones upheld); *United States v. Matthews*, 11 F. Supp. 2d 656 (D. Md. 1998) (prosecution of a seasoned reporter for receiving and transmitting child pornography over the Internet; denial of First Amendment defense)

[21] The February 22, 2000 opinion of the Tennessee Attorney General is available from the Tennessee Attorney General's website at http://www.attorneygeneral.state.tn.us/op/2000/OP/OP30.pdf. The June 16, 1997 opinion of the Oklahoma Attorney General is available as a part of a March 2000 guide for libraries published by the Oklahoma Department of Libraries and available over the Internet at http://www.odl.state.ok.us/fyi/filtering.pdf.

criminal conduct under many state laws. The crime would be committed using equipment made available by a state agency, knowing that the equipment could be – and likely would be – used to view illegal materials.

We submit that this Court has not previously construed the First Amendment to require a government agency to facilitate the commission of criminal offenses. We do not believe the First Amendment should be so construed now. As Justice Goldberg wrote for the Court almost 40 years ago, "while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). It is also not a basis for compelling a public library to aid and abet criminal conduct.

Conclusion

For the reasons stated in this and other briefs, the Court should vacate the decision of the district court and hold that the First Amendment does not preclude use of Internet filtering software by public libraries.

Respectfully submitted,

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